Supreme Court, U.S.
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No. 94

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

Harry Zych,
d/b/a American Diving and Salvage Company,
Petitioner,

v.

Unidentified, Wrecked & Abandoned Vessel,
Believed to be The SEABIRD,
Defendant,

and

Illinois Historic Preservation Agency,
Illinois Department of Transportation,
and the United States of America,
Intervening Defendants-Appellees.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Abandoned Shipwreck Act of 1987 violate the Constitution by (1) excluding a large class of salvage claims from federal court jurisdiction, or (2) by creating a non-uniform body of salvage law within the United States, or (3) by appropriating state-owned property to the United States?

THE PARTIES

In addition to the parties listed on the caption, briefs *amicus curiae* were (at some stage of the proceedings below) filed on behalf of the Intervenor-Defendants by

(1) The Attorneys General of the states of Alabama, Delaware, Florida, Georgia, Indiana, Kentucky, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Carolina, Texas, Vermont, Virginia, and Wisconsin, as well as of the territories or commonwealths of American Samoa, Virgin Islands, Guam, and the Northern Mariana Islands;

(2) The National Trust for Historic Preservation in the United States, Washington, D.C. (with the Society of Professional Archaeologists, Society of Historical Archaeology, Advisory Council on Historical Archaeology, Society of American Archaeology, Council of American Maritime Museums, Association for Great Lakes Maritime History, Landmarks Preservation Council of Illinois, Inc.).

A brief *amicus curiae* was also filed on behalf of the Petitioner by The American Sports Divers Association, New York, New York (with the Alliance for Maritime Heritage Conservation, International Scuba Association, Lady Elgin Foundation, Inc., and the Sindia Expedition, Inc.).

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Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner Harry Zych respectfully prays that a writ of certiorari issue to review the March 21, 1994,

judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit of March 21, 1994, *Zych v. The SEABIRD*, is reported at 19 F.3d 1136 (7th Cir. 1994) and is reprinted at Pet. App. 21, infra. A Petition for Rehearing and a Suggestion for Rehearing En Banc was denied on April 22, 1994. See 1994 U.S. App. Lexis 8713. This opinion will be referred to as "*Seabird II*" in this Petition.

Seabird II was decided on appeal from the U.S. District Court for the Northern District of Illinois, in a decision dated December 21, 1992, *Zych v. The SEABIRD*, reported at 811 F. Supp. 1300 (N.D. Ill. 1992).

The district court's decision of December 1992 followed an earlier remand from the Seventh Circuit, in an opinion of August 21, 1991, *Zych v. The SEABIRD*, reported at 941 F.2d 525 (7th Cir. 1991). This earlier Court of Appeals decision, of some significance to this Petition, will be referred to as "*Seabird I*." It is reprinted at Pet. App. 1.

Seabird I was decided on appeal from the U.S. District Court for the Northern District of Illinois, in a decision dated September 13, 1990, *Zych v. The LADY ELGIN and The SEABIRD*, reported at 746 F. Supp. 1334 (N.D. Ill. 1990).

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit of March 21, 1994. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 22, 1994. The Supreme Court has jurisdiction to review cases from the federal Courts of Appeals by virtue of 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1333.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides that the "judicial power of the United States shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1.

The Tenth Amendment to the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X.

The Eleventh Amendment to the Constitution provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of

another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

As this case challenges the constitutionality of The Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298 (Apr. 28, 1988), codified at 43 U.S.C. §§ 2101-06, many of its provisions are implicated in this case. The entire text of the Abandoned Shipwreck Act, hereinafter also the "Act" or "ASA," is reprinted at Pet. App. 33.

STATEMENT

1. The Abandoned Shipwreck Act was adopted by Congress in 1987. See Pub. L. No. 100-298 (Apr. 28, 1988), codified at 43 U.S.C. §§ 2101-06. The stated purpose of the Act was to "vest title to certain abandoned historic shipwrecks that are buried in State lands to the respective States. . . ." *Abandoned Shipwreck Act of 1987*, H.R. Rep. Nos. 100-514(I) & 100-514(II), 1988 U.S.C.C.A.N. 365, 365, 370. Congress estimated that there were as many as 50,000 abandoned shipwrecks located in the navigable waters of the United States, potentially under state jurisdiction. See id. at 365. While the ASA did not define what made a vessel "abandoned," it did refer to an "abandoned shipwreck" as being one "embedded in submerged lands of a State." ASA § 6(a)(1), 43 U.S.C. § 2105(a)(1).

To accomplish the goal of vesting title to ASA-covered shipwrecks in the states, Congress employed a two-step process in the ASA. First, the United States asserted title to all shipwrecks coming within the ambit of the Act. Id. This assertion of federal title was expressly grounded on the

"sovereign prerogative" of the United States to take title to "abandoned" property. 1988 U.S.C.C.A.N. at 375. Next, the United States transferred that federal title "to the State in or on whose submerged lands the shipwreck is located." Id. § 6(c), 43 U.S.C. § 2105(c).

Congress also decided that "the law of salvage and the law of finds shall not apply to abandoned shipwrecks" which the Act had transferred title to the states. Id. § 7(a), 43 U.S.C. § 2106(a). This meant two things. First, the ASA would be construed as overruling admiralty's common law of finds which would have, absent the Act, vested title in the finder of an abandoned shipwreck, or in the owner of the submerged lands in which it is embedded. Second, the states were free to adopt legislation which could bar or sharply curtail an individual's right to a salvage award for locating an abandoned shipwreck. 1988 U.S.C.C.A.N. at 371.

2. How The SEABIRD foundered and came to rest on the bottom of Lake Michigan is an intriguing story, one recounted with some fidelity by the courts below. See 19 F.3d at 1138-39, Pet. App. 23-25; 746 F. Supp. at 1336. It need not be repeated here. In any event, in 1989 Harry Zych discovered the wreck of The SEABIRD and filed an *in rem* admiralty action in federal district court seeking a declaration of ownership in the vessel, or, in the alternative, a liberal salvage award from its true owner. The district court issued its monition *in rem* and the wreck was seized by the United States Marshal. Jurisdiction in the district court was based on 28 U.S.C. § 1333.

The Illinois Department of Transportation and the Illinois Historic Preservation Agency intervened on behalf of the State of Illinois, asserting title to the remains of The SEABIRD, pursuant to the ASA, and also claiming that the

Eleventh Amendment barred Zych's salvage action. Zych countered by submitting that the Act was unconstitutional to the extent that it purported to divest him of title or to deny his salvage award. The United States then intervened to defend the ASA's constitutionality.

3. a. Upon its first review of the case, the district court conditioned its analysis on whether any litigation of Illinois' interest in The SEABIRD was barred by the Eleventh Amendment. If Illinois had a colorable claim to the wreck, the District Court, reasoning from this Court's decision in *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 690 (1982), concluded that to the extent Zych sought relief from the state of Illinois, his suit would be barred. See 746 F. Supp. at 1338-41. Illinois based its claim to The SEABIRD primarily on the ASA, and so Judge Rovner proceeded to consider Zych's constitutional challenges to that statute.

Drawing on this Court's admiralty clause jurisprudence, particularly *Panama Ry. Co. v. Johnson*, 264 U.S. 375, 386-87 (1924), the district court noted that the ASA would be unconstitutional if the statute excluded from the federal court's jurisdiction a subject-matter traditionally reserved to admiralty, or if it rendered the substantive maritime law non-uniform throughout the United States. Judge Rovner held that the ASA did neither. See id. at 1344-49. The district court therefore dismissed any claims against Illinois.[1]

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[1]Subsequent proceedings were taken as to ownership of the second wreck in the litigation, The LADY ELGIN. See 755 F. Supp. 213 (N.D. Ill. 1991), *vacated and remanded*, 960 F.2d 665 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 491 (1992).

b. The court of appeals reversed in the 1991 *Seabird I* decision. Departing significantly from Judge Rovner's analysis, the Seventh Circuit focused exclusively on the ASA. See 941 F.2d at 528, Pet. App. 5. But the court of appeals found that a ruling on the ASA's constitutionality was premature; there had been no finding that The SEABIRD was actually "embedded" in Illinois' submerged lands within the meaning of the Act. Absent such a finding, the ASA was apparently not even implicated. See id. at 530, Pet. App. 9.

Although the issue of the ASA's constitutionality was deferred, the court of appeals nonetheless opined on the two-pronged *Panama Ry.* test earlier elaborated by Judge Rovner. The Seventh Circuit, in what appeared to be entirely *dicta*, see id. at 534, Pet. App. 20, checked both the ASA's effect on traditional admiralty jurisdiction and on the uniformity of substantive maritime law. See id. at 530-31, Pet. App. 11-12. The court of appeals said that the issue whether the ASA excluded a substantial class of traditional admiralty causes from federal jurisdiction was "a close one," id. at 531, Pet. App. 13, and left that for further briefing and deliberation before the district court.

But on the matter of substantive uniformity, the Seventh Circuit said that "[i]f the ASA passes the first constitutional hurdle [of not impermissibly excluding a class of traditional cases from admiralty jurisdiction], then it passes constitutional muster, for it does not violate the second requirement that admiralty law foster uniformity." Id. at 532, Pet. App. 15. Thus collapsing the two-pronged test of *Panama Ry.* into one, the court of appeals noted that "[i]f the ASA permissibly takes embedded shipwrecks entirely out of the realm of federal admiralty jurisdiction, the uniformity principle has not been violated." Id. at 533, Pet. App. 17-18.

c. On remand to the district court, Zych stipulated that The SEABIRD is embedded in the submerged lands of Illinois, thus proffering the factual predicate for a constitutional review of the ASA, which Judge Rovner then undertook. See 811 F. Supp. at 1305. As to the first prong of *Panama Ry.*, the district court noted that there were two distinct issues. The first was whether the ASA impermissibly excluded finders claims against abandoned shipwrecks. The court concluded that it did not. Under admiralty's law of finds, pre-dating the ASA, the riparian held good title to moveable property embedded on its submerged lands. If the ASA merely codified title in the states to such property, the district court concluded that it did not unconstitutionally withdraw jurisdiction over such cases from the federal courts. See id. at 1313-15.

As to Zych's salvage claims, Judge Rovner held that if title in The SEABIRD was held by Illinois, any salvage claim against the state necessarily was barred by the Eleventh Amendment. If the Eleventh Amendment barred salvage actions against states, then the ASA could not be found to impermissibly remove such cases from federal court jurisdiction, as they were never within it in the first place. See id. at 1309-13.

Concluding that the ASA did not violate the first prong of *Panama Ry.*, the district court merely adopted the Seventh Circuit's dictum in *Seabird I* as its holding concerning the uniformity prong. "The Court has concluded . . . that Congress permissibly removed abandoned shipwreck litigation from federal admiralty jurisdiction. Thus, the Act poses no uniformity problem. . . . [E]ither pre- or post-ASA, title is awarded to the state, and the salvor is precluded from pursuing a salvage claim in federal court . . . . [T]he Act has no effect on the uniform application of federal admiralty law." Id. at

1315-16.

The district court disposed of the balance of Zych's constitutional arguments. These included submissions that the ASA's embeddedness requirement violated the due process clause and that the assertion of federal title to wrecks embedded in State bottomlands offended the Tenth Amendment. See id. at 1316-2. The district court thus held that the ASA was constitutional and that it had, therefore, no jurisdiction to entertain Zych's claims for title or for salvage against the state of Illinois.

d. The Seventh Circuit affirmed in *Seabird II*, the opinion here sought to be reviewed. Impressed with Judge Rovner's reasoning on the matter, Zych waived on appeal his claim of title to The SEABIRD as against Illinois. Conceding that the wreck was owned by the State prior to the ASA, Zych submitted that the ASA nonetheless is unconstitutional by (1) impermissibly excluding salvage claims from federal court jurisdiction, (2) by making the substantive admiralty law of salvage non-uniform, and (3) by asserting federal title to state-owned property.[2]

The Seventh Circuit held that the ASA did not unconstitutionally exclude salvage claims against states from federal court jurisdiction because such claims were never within that jurisdiction by virtue of the Eleventh Amendment. See 19 F.3d at 1141-42, Pet. App. 30-32. The court of appeals rejected Zych's submission that *in rem* salvage claims against sovereigns are not barred by the Eleventh Amendment

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[2]In addition, Zych renewed his Fifth Amendment argument, a contention which was not discussed by the Court of Appeals in deciding *Seabird II*. That constitutional challenge is not presented here.

where, as here, the *res* is not in the actual physical possession of the sovereign. Id. at 1142, Pet. App. 31.

As for the second prong of *Panama Ry.*, the Seventh Circuit simply referred to its earlier dicta in *Seabird I* and rebuffed Zych's renewed argument that the ASA created a non-uniform maritime law of salvage within the United States. 19 F.3d at 1140, Pet. App. 25. The court of appeals thus affirmed its earlier collapse of the two prongs of *Panama Railway*'s analysis of the permissible scope of congressional legislation in the maritime field.

A Petition for Rehearing and Suggestion for Rehearing En Banc were summarily denied, 19 F.3d at 1136, and this Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

IN UPHOLDING THE ASA, THE LOWER COURTS HAVE JETTISONED SETTLED ADMIRALTY CLAUSE JURISPRUDENCE AND HAVE RUN AGROUND ON STATE SOVEREIGNTY

This Petition calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity and coherence of the nation's admiralty and maritime law, and of its federal system. At stake is the constitutionality of the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298 (Apr. 28, 1988), codified at 43 U.S.C. §§ 2101-06 (hereinafter the "Act" or "ASA"), and the legal disposition of -- by Congress's own estimation -- nearly 50,000 shipwrecks littering navigable waters in the United States. See *Abandoned Shipwreck Act of 1987*, H.R. Rep. Nos. 100-514(I) & 100-514(II), 1988 U.S.C.C.A.N. 365, 365. Review of the Seventh Circuit's decisions is necessary because they distort this Court's long-established Admiralty Clause jurisprudence which dictates the permissible scope of congressional legislation in the admiralty area, and because they overlook fundamental Tenth Amendment doctrines.

I. THE ASA VIOLATES THE ADMIRALTY CLAUSE

The first major constitutional flaw of the ASA is its provision that "the law of salvage . . . shall not apply to abandoned shipwrecks", ownership of which the Act vests in the states. Id. § 7(a), 43 U.S.C. § 2106(a). By its abolition

of the law of salvage -- the right of a salvor to seek an award *in rem* from the putative owner of a shipwreck -- the ASA has worked a substantial and unconstitutional alteration to both the federal court's admiralty jurisdiction and to the uniformity of the national maritime law.

A. The Two Prongs of *Panama Ry.* The constitutional test for checking the validity of federal legislation in the admiralty field was provided by this Court's decision in *Panama Ry. Co. v. Johnson*, 264 U.S. 375 (1924), where it was noted that:

> there are limitations [to Congress's power to legislate maritime law] which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by *excluding a thing falling clearly within them* or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision [the Admiralty Clause of Article III] require that the enactments . . . shall be coextensive with and *operate uniformly in the whole of the United States*.

Id. at 386-87.[3] (Emphasis added). The two prongs of *Panama Ry.* are disjunctive: an Act of Congress may offend the admiralty clause if it excludes a traditional subject-matter from admiralty jurisdiction *or* if it renders the maritime law

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[3]This is substantively the same test invoked in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917), to review state maritime-related legislation, and also employed in this Court's recent decision in *American Dredging Co. v. Miller*, 114 S.Ct. 981, 985 (1994).

non-uniform. Petitioner submits that the ASA does both.

B. Impermissible Exclusion. In none of the opinions below is there any doubt expressed that salvage is a traditional subject-matter for the admiralty jurisdiction of federal courts. By eliminating the right of salvage to individuals who discover shipwrecks embedded in state-owned bottomlands, § 7(a) of the ASA denies access to federal courts for salvage actions against the putative state owner. By the very terms of *Panama Ry.*'s first prong, this is constitutionally infirm. The Seventh Circuit's logic saving the ASA from being impaled on this prong of *Panama Ry.*, is that the Eleventh Amendment never permitted *in rem* salvage actions against states in any event, so it cannot be said that the ASA, by excluding them, works any real change to the admiralty jurisdiction of the federal courts. See 19 F.3d at 1141-42, Pet. App. 32.

Petitioner takes strong exception to the conclusion that all *in rem* salvage actions against states are barred by the Eleventh Amendment. Because salvage awards are normally paid from the proceeds of the *res,* see, e.g., *Columbus-America Discovery Group,Inc. v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. den.* 113 S.Ct. 1625 (1993), such actions do not seek a disbursement from the public treasury of a State, as prohibited in *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). And because title is not in issue in salvage cases, they do not require a judicial declaration of title to the wreck, as blocked in *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982).[4]

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[4]Indeed, this Court's decision in *Treasure Salvors* has been interpreted by lower courts to permit an *in rem* salvage action against a State, provided that the wreck's ownership is not an issue. See *The Sindia Expedition v. The*

This view is entirely consistent with the wider body of Eleventh Amendment jurisprudence pertaining to admiralty causes. *In Re State of New York (The QUEEN CITY)*, 256 U.S. 503 (1921) ("*New York II*"), did bar those *in rem* admiralty proceedings which purport to use the process of the federal courts for "the seizure of property owned by the state and used and employed solely for its governmental uses and benefits." Id. at 510-11. This is not such a proceeding. Although the wreck of The SEABIRD is owned by the State of Illinois, it was not in the actual, physical possession of the State at the time of its seizure by the U.S. Marshal, and the property is certainly not, to use the language of *New York (II)*, being "used and employed solely for [Illinois'] governmental uses and benefits." The limiting language of *New York (II)* is clearly borrowed from *The DAVIS*, 77 U.S. 15 (1869), which expressly holds that "justice and sound policy" require that salvage claims against the federal government be not barred by sovereign immunity where the *res* is, as here, not in the actual physical possession of the government. The *Seabird II* opinion dismisses this point on the ground that federal sovereign immunity cases have no application to Eleventh Amendment issues. See 19 F.3d at 1142, Pet. App. 31.

Petitioner will be prepared to argue to this Court that *in rem* salvage claims against a State form an exception to Eleventh Amendment immunity, where (1) no claim is made against the State's treasury, (2) no assertion of title is made by

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SINDIA, 895 F.2d 116, 119-20 (3d Cir. 1990); *Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 197-99 (S.D. Fla. 1981). To the extent that the Seventh Circuit's decision in *Seabird II* is to the contrary, there is a manifest split in the Circuits on this point left open by *Treasure Salvors*.

the salvage claimant, and (3) the *res* is not in the actual, physical possession of the State nor being "used and employed solely for its governmental uses and benefits." Prior to the ASA, then, Harry Zych's salvage claim could proceed against the State of Illinois in federal court. By now excluding it, the ASA violates the first prong of *Panama Ry.*

C. Uniformity. Because the ASA allows the states to adopt legislation which could bar or sharply curtail a salvor's right to a salvage award for locating a shipwreck, see id. § 5(c), 43 U.S.C. § 2104(c); House Report No. 100-514(II), at 6, 1988 U.S.C.C.A.N. at 374; 55 Fed Reg. 50116, 50132 (Dec. 4, 1990), a patch-work of state legislation has been created by the ASA.[5] The entirety of this regulation is dependent on the constitutionality of the ASA, as Congress itself acknowledged when adopting the Act in 1987. House Report No. 100-514(II), at 2-3, 8, 1988 U.S.C.C.A.N. at 371, 377.

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[5]Forty-six states and three territories have legislation claiming title to and preservation of historic sites and objects. Of these, seventeen states have extended their cultural heritage laws to abandoned shipwrecks as defined under the ASA. Of these seventeen jurisdictions, twelve have specifically enacted statutes which give authority to state agencies to regulate the salvage of abandoned shipwrecks, often at wide variance to traditional federal, admiralty law principles. For this latter category, see Ala. Code § 41-9-249.1; Cal. Pub. Res. Code §§ 6309, 6313, 6314; Fla. Stat. Ann. § 267.061(b); Ga. Code Ann. § 12-3-80 *et seq.*; La. Rev. Stat. Ann. § 41:1605; Mass. Gen. L. ch. 91, § 63; Mich. Comp. Laws §§ 299.51 *et seq.* & 399.301 *et seq.*; Miss. Code Ann. §§ 39-7-3, 39-7-9; N.C. Gen. Stat. § 121-22 *et seq.*; S.C. Code Ann. § 54-7-650 *et seq.*; Tex. Nat. Res. Code Ann. § 191.091; Va. Code Ann. § 10.1-2214.

For the Court's convenience, full citations to these statutes (in each of these mentioned categories), is provided at Pet. App. 39.

Petitioner's contention is that in this respect the ASA violates the uniformity principle of the Admiralty Clause. But aside from implicating the validity of the ASA and all of the new state regulation in this field, there is also the immensely significant issue of the continued vitality of the uniformity principle itself in federal admiralty law. While the Seventh Circuit's decision in *Seabird II* makes an obliging citation to this Court's recent decision in *American Dredging Co. v. Miller*, 114 S.Ct. 981 (1994), see 19 F.3d at 1139, Pet. App. 26, the panel seemed to miss the point of that decision insofar as it confirms uniformity as an independent check on both state *and* federal legislation in the maritime area.

The key misstep made in *Seabird I*, 941 F.2d at 532, Pet. App. 15-16, and repeated in *Seabird II*, 19 F.3d at 1140, Pet. App. 25, is to collapse the two prongs of *Panama Ry.* and to ignore the uniformity problems created by eliminating the substantive law of salvage for ASA shipwrecks. The logic of the Seventh Circuit was to assume that the Constitution is not implicated when it is *Congress* that is authorizing non-uniform admiralty law, just so long as the first prong of *Panama Ry.* is satisfied and there is no facial alteration of traditional federal admiralty jurisdiction. See 941 F.2d at 532-33, Pet. App. 16.[6] The Seventh Circuit has, on its own authority, overruled the uniformity check of *Panama Ry.* Petitioner will be prepared to argue that even if the Eleventh Amendment is a bar to *in rem* salvage actions against states in federal court,

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[6]For this proposition, the *Seabird I* opinion relied exclusively on this Court's decisions reviewing *state* law enactments for uniformity compliance. See 941 F.2d at 532-33 (citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Just v. Chambers*, 312 U.S. 383 (1941); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986)).

and that such proceedings must be brought in state courts, the law to be applied in such actions must be the federal, uniform law of salvage, and not the localized legislation countenanced by the ASA.

This case thus presents an opportunity to the Court to face the wider issue not confronted in *American Dredging Co. v. Miller*: whether the *Panama Ry.* doctrines truly restrain *federal* law-making in admiralty. Petitioner will submit that there remain independent checks on congressional law-making power in maritime law. These limitations are rooted in the Admiralty Clause, and also in those other constitutional provisions that speak to uniformity of commercial legislation.[7] Since the ASA facially violates the uniformity principle -- confirmed by the fact that it has already spawned discordant state legislation -- it is unconstitutional. This case implicates profound concerns for the integrity of a vital and uniform admiralty law in this country.

II. THE ASA VIOLATES THE TENTH AMENDMENT

There is another, deeper constitutional infirmity in the ASA, involving the Tenth Amendment.

The rationale of the Seventh Circuit's conclusion that the ASA does not violate the first prong of *Panama Ry.* depends upon The SEABIRD being owned by the State of Illinois, prior to enactment of the ASA. The court says

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[7]See U.S. Const. art. I, § 8, cl. 3 (Commerce Clauses); art. I, § 9, cl. 6 (Port Preference Clause); art. I, § 10, cl. 2 (prohibition of States to lay imposts or duties of imports and exports).

> If [absent the ASA] the property consisting of the *Seabird* and its accompanying cargo are owned by the State of Illinois, the Eleventh Amendment prohibits us from adjudicating Zych's salvage claim, as we have explained. . . . . The ASA then, as it affects this case, does not exclude a thing that clearly falls within the admiralty and maritime law.

19 F.3d at 1142, 1143, Pet. App. 30, 32. The law of finds vested title to The SEABIRD in the State prior to the ASA, and the Seventh Circuit concludes that "Zych, the ASA and the law of finds all agree that Illinois owns the *Seabird*." 19 F.3d at 1141, Pet. App. 28. Therefor, the court holds, the ASA works no change in federal admiralty jurisdiction and so does not violate the first prong of *Panama Ry.*, as discussed *supra*, in Part I hereof.

This logic is fundamentally inconsistent with a basic premise of the ASA. Section 6(a) of the Act, 43 U.S.C. § 2105(a), purports to assert *federal* title to the shipwrecks to which the Act applies. Section 6(c) then transfers that federal title to the respective states in whose waters the wrecks are located. However, as the appellate court here explains, 19 F.3d at 1141, Pet. App. 27-28, the law of finds acted to vest title to abandoned and embedded shipwrecks in the states *prior to the ASA*. Congress has no power, under the Tenth Amendment, to appropriate state-owned property to the federal government.

Petitioner will be prepared to argue that the "sovereign prerogative" doctrine, upon which the assertion of federal title to ASA shipwrecks is expressly based, H.R.Rep., *supra,* 1988

U.S.C.C.A.N. at 375, is unavailing, as the United States is not the sovereign as to state-owned submerged lands. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845).

This case thus presents another aspect of the Tenth Amendment issue recently considered by this Court in *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408 (1992). There the Court said that the Tenth Amendment prohibits Congress from "commandeering" state legislative power in aid of a federal policy or program. Here, Congress has commandeered not state power, but state *property* in furtherance of federal legislative ends.

Petitioner submits that it is insignificant that, after asserting federal title to formerly state-owned shipwrecks, Congress has immediately returned them to state ownership. There is nothing in Tenth Amendment jurisprudence which would condone such a transaction, any more than it would condone outright federal confiscation, with no return. Further, in the process of passing through the hands of the federal straw-man, the state property here has had several strings attached to it; or, perhaps more aptly, has had severed from it the strings which formerly attached it to admiralty jurisdiction and which created petitioner's salvage lien.

This is no mere technical quibble over the form of conveyance. The assertion of federal title to ASA shipwrecks in § 6(a), 43 U.S.C. § 2105(a), is the hook by which hangs the abolition of salvage law in § 7(a), 43 U.S.C. § 2106(a). If the assertion of federal title fails, then the abolition of salvage falls.

The harm to our federal system threatened by this

congressional commandeering of State property is no less severe than that condemned by this Court in *New York v. United States, supra.* Indeed, it may be more insidious. For if Congress can usurp state title or attach conditions thereto in the service of a federal program, the sovereignty of the States is significantly diminished.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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APPENDIX

App. 0

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 22, 1994.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. DANIEL M. FRIEDMAN, Circuit Judge*

Hon. KENNETH F. RIPPLE, Circuit Judge

HARRY ZYCH, d/b/a AMERICAN DIVING AND SALVAGE COMPANY, Plaintiff-Appellant, No. 93-1426 v. UNIDENTIFIED, WRECKED AND ABANDONED VESSEL, BELIEVED TO BE THE "SEABIRD," etc., Defendant, and ILLINOIS HISTORIC PRESERVATION AGENCY, ILLINOIS DEPARTMENT OF TRANSPORTATION, and UNITED STATES OF AMERICA, Intervening Defendants-Appellees.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 89 C 6502 ILANA DIAMOND ROVNER, Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by plaintiff-appellant, all of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon. Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

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* The Honorable Daniel M. Friedman, Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
No. 90-3187
Aug. 21, 1991

Harry Zych, d/b/a American Diving & Salvage Co.,
Plaintiff-Appellant,

v.

Unidentified, Wrecked, and Abandoned Vessel, Believed To Be the "Seabird," etc., Defendant.

and

Illinois Department of Transportation and the Illinois Historic Preservation Society and United States of America, Intervening Defendants-Appellees.
941 F.2d 525 (7th Cir.1991)

The prospect of raising the "Seabird," a 638-ton sidewheel steamer that has lain on the bed of Lake Michigan for the past 123 years, raises some fascinating and complex questions of admiralty law, federalism and state sovereign immunity. The issues are prematurely presented in this appeal, however, and we therefore must remand for a key factual finding.

BACKGROUND

The Seabird's story involves neither fabulous buried treasure nor a maritime tragedy of epic proportions. Undeniably, though, there is pathos in its more ordinary tale. The Seabird, newly painted for the summer season, sailed from Manitowoc, Wisconsin, on April 8, 1868, bound for Chicago via Milwaukee, Racine and Kenosha. About one hundred passengers were aboard and each had paid a fare of one dollar. The first evening on the lake was chilly. In the early morning hours of April 9, while the Seabird was off the shore of Waukegan, a porter emptied the stove which had been warming the passengers in the main cabin. He threw the load

of hot ashes off the side of the boat, but the wind blew the ashes back aboard, and some varnished tubs on deck ignited. Soon the ship was aflame. The passengers who jumped overboard perished quickly in the 36-degree water. The ship sank and only two passengers survived.

Harry Zych, who operates a commercial salvage business, found the Seabird in the summer of 1989 after ten days of diving and hours of library research. He located portions of the hull, boilers, machinery and other ship components. He filed this admiralty action *in rem* on August 29, 1989, naming the wreck as the defendant and representing that it was located within the territorial jurisdiction of the Northern District of Illinois. As relief, Zych sought title to the shipwreck under the law of finds or a salvage award under the laws of salvage. He asked that his title or salvage award be confirmed against "all claimants and all the world" and requested further that "all governments * * * [or] states * * * be cited to appear * * * and show cause why possession should not be delivered to plaintiff."

On November 20, 1989, the Illinois Department of Transportation ("IDOT") and the Illinois Historic Preservation Agency ("IHPA") (together "the state")[1] intervened as defendants for the limited purpose of moving to dismiss the case against the state on Eleventh Amendment grounds. The

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[1]IDOT is trustee of the Illinois portion of Lake Michigan's lakebed. IHPA is the agency responsible for maintaining historically significant properties of the state of Illinois.

state claimed title to the shipwreck under three state statutes[2] and two federal statutes, namely the Abandoned Shipwreck Act of 1987, 43 U.S.C. s 2101 et seq. (1988), and the Submerged Lands Act, 43 U.S.C. s 1301 et seq. (1988). When in response Zych challenged the constitutionality of the Abandoned Shipwreck Act, the United States intervened to defend the statute's constitutionality.

The district judge subsequently dismissed Zych's suit. The court first held, in a detailed opinion, that the *in rem* action could be considered one against the state for Eleventh Amendment purposes if the state had a colorable claim to the shipwreck. The judge then examined the possible grounds for the state's claim of ownership. She found two of the state statutes invoked by the state to be inapplicable and declined to interpret the terms of the third.[3] These findings are not challenged on appeal. The judge ultimately held that the state's claim of title was colorable on the basis of the law of finds, in conjunction with the federal Submerged Lands Act ("SLA"). The law of finds, developed originally at common law and then incorporated into admiralty, gives legal force to the venerable maxim "finders-keepers." Under an exception

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[2]The state invoked the Aboriginal Records and Antiquities Act, Ill.Rev.Stat. ch. 127, ¶ 133c1 *et seq.* (1987); the Rivers, Lakes and Streams Act, Ill.Rev.Stat. ch. 19, ¶ 52 *et seq.* (1989); and the Human Grave Protection Law, Ill.Rev.Stat. ch. 127, ¶ 2661 *et seq.* (1989).

[3]The judge concluded that neither the Rivers, Lakes and Streams Act nor the Human Grave Protection Law purported to grant the state title to submerged or buried artifacts. She declined to reach the issue of whether the Aboriginal Records and Antiquities Act could support the state's claim, because it had been amended during the pendency of the lawsuit and neither party had addressed in its briefs the effect of the amendments.

to the rule, if a find is embedded in someone's land, the owner of the land is the keeper. Because under the SLA the owner of the lakebed is Illinois, the judge ruled that the state had colorable title to the Seabird, which she believed "likely embedded in submerged lands." *Zych v. Unidentified, Wrecked & Abandoned Vessel, Believed to be SB "Lady Elgin,"* 746 F.Supp. 1334, 1343 (N.D.Ill.1990).

The judge ruled alternatively that the Abandoned Shipwreck Act ("ASA") supported the state's claim. By the provisions of the ASA, the United States claimed title to all shipwrecks "embedded" in the submerged lands of a state and simultaneously transferred title of those wrecks to the states in which they are located. After rejecting Zych's challenges to the constitutionality of the Act, the court found that the ASA, like the law of finds, supported the colorability of the state's claim. Because the state had a colorable claim, Zych's suit was an action against the state barred by the Eleventh Amendment. The court dismissed the suit with respect to the state. The court then dismissed the case in its entirety, finding that "further proceedings in federal court would be superfluous because the primary dispute involves the State and the State is thus an indispensable party, see Fed.R.Civ.P. 19(b)." *Id.* at 1351.

Zych appeals, arguing that the state has no colorable claim and thus that the Eleventh Amendment presents no bar to his suit. He notes that though the district court's holding turns on "embeddedness," the court never actually found the Seabird to be embedded. He stresses that the effect of the ruling below is to deprive him of any forum to litigate his claim. His suit in federal court was dismissed because he is unable to sue the state in federal court without contravening the Eleventh Amendment, but a state court suit is impossible because

federal jurisdiction over maritime matters is exclusive. See 28 U.S.C. § 1333. Zych also renews his arguments about the constitutionality of the ASA, contending that it impermissibly interferes with admiralty jurisdiction and destroys the uniformity of admiralty law. Finally Zych asks that even if the state prevails on the above arguments, the case be remanded with instructions that the district court adjudicate his rights in the wreck with respect to parties other than the state.

We agree that the case turns on the question of embeddedness, though we interpret the relevance of this question differently than the parties or the district judge. We remand to the district court for a finding on whether the Seabird is in fact embedded and if so, whether the ASA is constitutional so as to allow its application to this case.

ANALYSIS

Unlike the district judge, we focus exclusively on the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101 *et seq.*, a brief statute that has not previously been invoked or challenged in litigation. If the ASA applies to this case, and is found constitutional, it is dispositive. The ASA explicitly precludes a claimant to an "embedded" wreck from invoking the law of finds or the law of salvage. Because these are the only two admiralty causes of action stated in Zych's complaint, if the ASA constitutionally can be applied to the Seabird, Zych has simply failed to state a right to relief. The Eleventh Amendment bar is irrelevant, as is any "colorability" analysis.[4] However, as explained *infra*, the entry of judgment

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[4]The district court's analysis of Zych's claims under both the ASA and the law of finds was erroneous since the ASA precludes reference to the law of finds where the ASA applies.

against Zych in this suit would not necessarily leave Zych without a forum in which to adjudicate his dispute. We believe the ASA, if constitutional, opens the way for a state court to determine title to the Seabird.

Congress enacted the ASA in an attempt to clear longstanding confusion over whether the states or the federal government owned and had responsibility for managing historic wrecks. The House Report noted the existing confusion:

> over the ownership and authority to manage abandoned shipwrecks. States have claimed title to, and regulatory authority over, abandoned historic shipwrecks located on submerged lands under their jurisdiction. The Federal Admiralty Courts have also claimed jurisdiction over the salvage of these resources.

H.R.Rep. No. 100-514(I), 100th Cong., 2d Sess., reprinted in 1988 U.S.Code Cong. & Admin.News 365, 366 [hereinafter House Report]. While 28 states had passed legislation relating to the management of historic shipwrecks at the time the ASA was being considered, they had achieved only limited success in enforcing their laws. *Id.* at 366. Some federal courts had held that cases involving shipwrecks were within their exclusive admiralty jurisdiction and applied either the law of finds or the law of salvage to adjudicate the disputes before them. *See, e.g., Platoro, Ltd. Inc. v. Unidentified Remains of a Vessel*, 614 F.2d 1051 (5th Cir.), certiorari denied, 449 U.S. 901, 101 S.Ct. 272, 66 L.Ed.2d 131 (1980); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir.1978); *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir.1987). Courts also had specifically held that any applicable state

regulation was pre-empted by admiralty principles. *See, e.g., Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel,* 525 F.Supp. 186 (S.D.Fla.1981), *contra, Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel,* 577 F.Supp. 597 (D.Md.1983), affirmed without opinion, 765 F.2d 139 (4th Cir.1985). Senator Bill Bradley, sponsor of the Senate bill, expressed a concern that "[u]nder the current system, Federal courts--sitting in admiralty--have substantial policymaking power, which has resulted in uneven judgments about the historical value of shipwrecks." 113 Cong.Rec. S. 3988-3989 (March 26, 1987).

Congress' answer was to assert federal ownership of certain shipwrecks and simultaneously transfer title of those wrecks to the states for administration, management and regulation. In Section 6(a) of the ASA the United States claims title to all abandoned shipwrecks either embedded in the submerged lands of a state or resting on submerged lands of a state but eligible for inclusion in the National Register of Historic Places. 43 U.S.C. § 2105(a). Section 6(c) of the ASA transfers title of the shipwrecks specified in 6(a) to the states in which they are located. 43 U.S.C. § 2105(c). Section 5 mandates that the Secretary of the Interior establish guidelines within nine months after enactment of the ASA to "assist states * * * in developing legislation and regulations to carry out their responsibilities under this Act." 43 U.S.C. § 2104(c). Congress contemplated that after promulgation of federal guidelines, states would "have jurisdiction over and management responsibility for" historic wrecks in state waters.[5] House Report at 373.

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[5]The United States retains title to historic wrecks located on public lands of the United States. 43 U.S.C. § 2105(d).

Two aspects of the ASA are especially important for our purposes. First the scope of the ASA is limited. Congress only cared to transfer ownership and ensure protection of shipwrecks of "historic significance," House Report at 365, which it estimated to be a mere five to ten percent of the 50,000 abandoned shipwrecks located in the navigable waters of the U.S. House Report at 365. In the ASA, the concept of "embeddedness" serves as a proxy for historic value. The ASA encompasses abandoned shipwrecks:

> (1) embedded in submerged lands of a State;
> (2) embedded in coralline formations protected by a State on submerged lands of a state; or
> (3) on submerged lands of a State and * * * included in or determined eligible for inclusion in the National Register [of Historic Places].

43 U.S.C. § 2105(a). "Embedded" in turn was defined to mean:

> firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof.

43 U.S.C. § 2102(a). The statute thus indicates that an embedded wreck is one that is at least partially buried.

Second, a finder of an abandoned shipwreck to which the ASA applies can no longer seek a declaration of ownership under the law of finds or a salvage award under the law of salvage. Section 7 of the Act declares "The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 6 of this Act applies." 43 U.S.C. § 2106(a). Congress believed these admiralty principles "not well-suited

to the preservation of historic and other shipwrecks to which this Act applies." House Report at 377. Senator Bradley, for example, questioned the wisdom of allowing the "finders-keepers" principle to determine the ownership of wrecks which might have considerable historical or cultural value. 113 Cong.Rec. S. 7050 (March 26, 1987). Salvage law, which apportions awards to those who rescue ships using factors such as degree of success of recovery and time and labor expended, was deemed similarly unsuited. The law did not allow a consideration of factors such as archaeological or historical value. House Report at 377. Congress thus undertook to "carve out a limited exception from general admiralty principles" for those classes of shipwrecks covered by the Act. *Id.*

This description of the ASA and its purposes, as gleaned from the legislative history, raises two questions to be resolved with respect to the Seabird. First, does the ASA apply to this case at all? If so, we must confront the second question: whether the scheme created by Congress--to eliminate or "carv[e] out" of admiralty a certain block of cases apparently within admiralty jurisdiction prior to enactment of the ASA--contravenes any constitutional principles.

The district judge's conclusion that the Seabird is "likely embedded" is insufficient to answer the first question. The ASA sets forth a specific definition of "embeddedness" to fulfill Congress' intention that only certain historic wrecks come within its scope. The district court should hold an evidentiary hearing to determine if the Seabird is indeed "firmly affixed" in the submerged lands of a state so as to fall within the purview of Section 6(a)(1).[6] Neither party

presented the district judge with evidence below, and apparently only Zych has seen the Seabird in its present watery habitat. Zych himself can testify at the hearing on remand.[7]

If the Seabird is embedded, the constitutionality of the ASA must be decided, for it will determine Zych's ability to pursue

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[6]Neither party contends that the Seabird's site has been declared eligible for inclusion in the National Register of Historic Places so as to subject the Seabird to the ASA under Section 6(a)(3).

Though we agree with plaintiff that a specific finding of embeddedness is necessary for Section 6(a)(1) of the ASA to apply, we reject plaintiff's argument that the United States must give public notice of all wrecks to which it purports to be asserting title under Section 6(a)(1) for the assertion of title to be valid. The first sentence of Section 6(b) requires the United States to give "adequate notice of the location of any shipwreck to which title is asserted under this section." However, Section 6(b) qualifies Section 6(a)(3), not Section 6(a)(1) or (2). Section 6(b), in its second sentence, sets out the means by which a wreck is determined eligible for inclusion in the National Register of Historic Places. This makes it apparent that the notice requirement of Section 6(b) refers only to shipwrecks qualifying for ASA treatment under Section 6(a)(3), those lying on submerged lands but eligible for inclusion in the National Register.

[7]"Embeddedness" in the ASA is to be "consistent with the recognized exception from the law of finds for shipwrecks embedded in submerged lands of a state." House Report at 375-376. As used in the context of the law of finds, embeddedness is a factual question to be established by evidence. *See Chance v. Certain Artifacts Found & Salvaged from The Nashville*, 606 F.Supp. 801, 807 (S.D.Ga.1984) (court finds "vessel is firmly attached to river bottom" after hearing evidence from expert diver), affirmed without opinion, 775 F.2d 302 (11th Cir.1985); *Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 568 F.Supp. 1562, 1566 (S.D.Fla.1983) (court finds vessel embedded after hearing uncontradicted testimony and viewing film indicating wreck is substantially buried in land), affirmed, 758 F.2d 1511 (11th Cir.1985).

a suit in federal court.[8] The ASA eliminates the only two admiralty grounds upon which finders of wrecks like Zych traditionally have claimed relief in federal court, the law of salvage and the law of finds.

Congressional enactments modifying substantive admiralty law can be challenged on two grounds. The Constitution extended the judicial power to "all cases of admiralty and maritime jurisdiction," U.S. Const. Art. III, § 2, and Congress, in implementing the grant of jurisdiction, made it exclusive. See 28 U.S.C. § 1333. Courts have interpreted the Constitution to allow Congress to "alter, qualify or supplement the substantive admiralty law [presumed to be in existence at the writing of the Constitution]." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748. This power is subject to two important limitations, however.

> One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments * * * shall be co-extensive with and operate uniformly in the whole of the United States.

Id. at 386-387, 44 S.Ct. at 393-94. Thus Congress is free to "arrange and rearrange substantive maritime remedies," *Lucas v. "Brinknes" Schiffahrts Ges.*, 387 F.Supp. 440, 443

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[8]This assumes no other basis for federal jurisdiction can be found. The parties are not alleged to be diverse. The ASA itself gives finders no cause of action or right to relief.

(E.D.Pa.1974) (three-judge court), but cannot "expand and contract admiralty jurisdiction," *id.*, nor can it leave admiralty law non-uniform.

The district judge found that the ASA presented no serious constitutional question because it changed substantive laws without altering jurisdiction. *Zych*, 746 F.Supp. at 1345. She believed that Congress' elimination of causes of action based on the law of salvage and the law of finds deprived shipwreck finders of a right to relief but did not divest federal courts of jurisdiction to hear cases involving embedded shipwrecks.

The distinction drawn by the district judge cannot be supported. As we have explained, the purpose of the ASA was not simply to rearrange substantive remedies but to transfer management of and litigation over embedded shipwreck sites from the federal courts to the states. Congress set out to change the forum in which embedded shipwreck cases are heard. See House Report at 375 (contemplating that parties affected by the ASA will seek "recourse * * * provided under state law"). The provisions of the ASA explicitly direct the development of state legislation, see 43 U.S.C. § 2104, thus implicitly authorizing litigation in state courts. In short, depriving those who find embedded shipwrecks of causes of action based on the law of salvage and the law of finds divests federal courts of their admiralty jurisdiction over such claims, and concurrently vests state courts with jurisdiction over the same claims.[9]

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[9]The elimination of the law of salvage as applied to embedded shipwrecks in particular would destroy a finder's ability to bring a federal *in rem* admiralty action. *In rem* jurisdiction exists when a maritime lien arises. Fed.R.Civ.P. C(1) (Supplemental Rules of Certain Admiralty and Maritime Claims). It is the salvage claim that gives rise to a lien, for the salvage award

Once it is acknowledged that the ASA alters admiralty jurisdiction, constitutionality is a trickier question than thus far has been envisioned. Changes in jurisdiction are not wholly precluded, but Congress cannot exclude from admiralty jurisdiction classes of cases previously "falling clearly within" admiralty jurisdiction. *Panama*, 264 U.S. at 386-387, 44 S.Ct. at 393-94. Presumably this means that Congress may clarify admiralty jurisdiction at the margins but cannot work fundamental changes. Thus it is only if cases involving abandoned shipwrecks were not clearly within admiralty jurisdiction even previous to passage of the ASA that Congress could re-draw the boundary of admiralty jurisdiction in a manner which excluded those cases from the federal courts.

The question of whether abandoned shipwreck litigation was properly, firmly within the scope of admiralty jurisdiction prior to the ASA is a close one. It can be argued that it was not. The primary focus of the jurisdiction "is unquestionably the protection of maritime commerce." *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674, 102 S.Ct. 2654, 2658, 73 L.Ed.2d 300. Thus typical admiralty matters are those related to commercial vessels and those who operate them. They involve maritime contracts or torts on navigable waters. *DeLovio v. Boit*, 7 Fed.Cas. 418, 444 (No. 3,776) (C.C.Mass.1815)(Story, J.). Laws developed to govern maritime commerce have only been stretched to apply to litigation over abandoned shipwrecks with some imagination. The law of salvage, for example, originally developed to offer economic incentives to seamen observing ships and cargo in immediate marine peril to undertake rescue efforts. Some

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is secured by the ship itself. Norris, 3A Benedict on Admiralty § 143 (1991).

courts exercised admiralty jurisdiction over cases involving even long-abandoned and wrecked vessels by extending the applicability of the law of salvage, see, *e.g., Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F.Supp. 540, 557 (S.D.Fla.1982) (even wreck is "in peril" of being lost through the action of the elements). Others thought the link too tenuous. See, *e.g., Treasure Salvors*, 569 F.2d at 337 (application of salvage law to shipwreck "stretches a fiction to absurd lengths"). As to the law of finds, courts disagree about whether it is admiralty law at all.[10] Thus it is possible to read the ASA as Congress' legitimate expression of a preference that abandoned shipwreck cases be treated as non-admiralty, made in response to questions about jurisdiction raised but not settled by the federal courts.

On the other hand, it can persuasively be argued that federal jurisdiction over abandoned shipwreck cases was unquestioned before passage of the ASA. The Supreme Court implicitly accepted the existence of such jurisdiction. See *Florida Dept.*

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[10]The law of finds developed at common law but has come to be considered a maritime concept. See Owen, The Abandoned Shipwreck Act of 1987: Goodbye to Salvage in the Territorial Sea, 19 J. of Mar.L. & Comm. 499, 510 (1988). Compare *Subaqueous*, 577 F.Supp. at 611 (referring to "maritime law of finds"); *Treasure Salvors*, 569 F.2d at 336 (law of finds is adjunct to salvage law), with *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F.Supp. 1377, 1385 (S.D.Fla.1988) ("resolution to a claim of ownership * * * of an historic shipwreck must be based on application of the common law of finds"); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir.1985) ("The common law of finds generally assigns ownership of the abandoned property * * * "). Congress seems to have assumed that the law of finds was indeed an aspect of admiralty law. See, *e.g.*, House Report at 366 ("Aspects of admiralty law most applicable [to historic wrecks] are the 'Law of Finds' * * * 'and the Law of Salvage.' ").

of State v. Treasure Salvors, Inc., 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057. Federal courts rarely dismissed shipwreck cases altogether for want of jurisdiction, typically finding federal jurisdiction to exist on either the basis of the law of salvage or the law of finds, even when they declined to apply one of the two. Compare, *e.g.*, *Platoro*, 614 F.2d at 1051, with *Treasure Salvors*, 569 F.2d at 330. Congress, too, at points in the legislative history to the ASA, seems to concede that admiralty jurisdiction over abandoned shipwrecks is clear in the absence of the ASA. See, *e.g.*, House Report at 371 ("This jurisdiction includes claims for salvage of abandoned shipwrecks").

We leave resolution of the question for another day. Courts are justifiably reluctant to strike down legislation unless the question is squarely presented. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645. The ASA has not yet been determined to apply to the Seabird. The district judge, should she find on remand that the Seabird is embedded, will revisit the constitutionality question. We express no agreement or disagreement with her original conclusion that the ASA is constitutional, though as the preceding discussion has indicated we see the relevant issues somewhat differently from the court below.

If the ASA passes the first constitutional hurdle, then it passes constitutional muster, for it does not violate the second requirement that admiralty law foster uniformity. The language of the Constitution does evidence "a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry." Black, Admiralty Jurisdiction, 50 Col.L.Rev. 259, 262 (1950). The uniformity principle has been interpreted to ensure the supremacy of

federal admiralty law, where admiralty law clearly applies. Thus the cases invoking the principle hold, for example: that a state worker compensation law is preempted by admiralty law when a maritime worker on a vessel in navigable waters claims disability, see *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834; that the Death on the High Seas Act pre-empts the Louisiana wrongful death statute for death occurring outside of state territorial waters, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174; and that state tort laws cannot be applied to an accident between two pleasure boats on navigable waters, once the accident is determined to be within admiralty jurisdiction, *Foremost*, 457 U.S. at 668, 102 S.Ct. at 2654. The uniformity principle leaves states free to enact and enforce legislation that is neither "hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *Just v. Chambers*, 312 U.S. 383, 388, 61 S.Ct. 687, 691, 85 L.Ed. 903.[11] It thus follows that if the management of historic wreck sites is not a concern central to admiralty, state regulation in the area is permissible.[12] If the

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[11]Recently the Supreme Court has implied that the uniformity doctrine is only properly invoked to strike down state legislation when it purports to regulate commercial navigation, "suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews." *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (Florida Oil Spill Prevention and Pollution Control Act not pre-empted by Admiralty Extension Act).

[12]Thus the ASA can be read as a waiver of pre-emption. It allows the application of state law in an area arguably regulated by admiralty law. Though not directly relevant to this case, the "savings to suitors" clause of 28 U.S.C. § 1333 should be mentioned. Section 1333, the statute implementing

ASA permissibly takes embedded shipwrecks entirely out of the realm of federal admiralty jurisdiction, the uniformity principle has not been violated.

State court suits over embedded shipwrecks may, then, proceed. The parties and the district judge believed that the ASA might leave Zych, after dismissal of his federal case, without a forum.[13] Their preoccupation stemmed from a mistaken notion that a suit over an embedded shipwreck remains one at admiralty even after passage of the ASA. They believed embedded shipwreck cases are still exclusively within the province of the federal courts, even if the ASA forbids application of substantive admiralty law. In fact the ASA purports to remove litigation involving the ownership of embedded shipwrecks from the purview of admiralty jurisdiction altogether. Assuming that this jurisdictional alteration is constitutional, states are free to adjudicate the cases.

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the constitutional grant of jurisdiction over admiralty cases, qualifies the district courts' exclusive jurisdiction by "saving to suitors in all cases other remedies to which they are otherwise entitled." The savings to suitors clause has been interpreted to "leave[ ] state courts competent to adjudicate maritime causes of action in proceedings *in personam.*" *Offshore Logistics*, 477 U.S. at 222, 106 S.Ct. at 2494. The clause thus explicitly creates an area of concurrent jurisdiction for admiralty cases which can be pursued *in personam* in state court. However, federal law must be applied to these state court suits because they remain admiralty cases. This "reverse-*Erie*" doctrine has been examined in Currie, Federalism and the Admiralty: The Devil's Own Mess, 1960 Sup.Ct.Rev. 158.

[13]This argument is something of a red herring. It is the interaction of admiralty jurisdiction and the Eleventh Amendment which might deprive Zych of a forum. The ASA did nothing to alter the dilemma Zych faces: any action brought in admiralty against the state will be both barred in federal court and outside a state court's jurisdiction.

We acknowledge that Zych may have trouble finding an appropriate Illinois state law under which to sue.[14] Illinois recently passed the Archaeological and Paleontological Resources Protection Act ("APRPA"), the first Illinois statute that applies explicitly to shipwrecks. See Ill.Ann.Stat. ch. 127, ¶ 133c.01 *et seq.* (Smith-Hurd Supp.1991). Pursuant to the statute, Illinois now grants permits for the excavation of abandoned shipwrecks, *id.*, and these permits will govern the rights between the salvor and the state in future cases. Unfortunately for Zych, the APRPA became effective in January 1990, six months after he located the Seabird. Zych may be able to make use of common law property or contract notions to wrest the ownership conferred on the state in the first instance by the ASA. Also, Zych might seek retroactive application of the APRPA to claim the same rights in the Seabird that other salvors now are given by permit. The options have not yet been explored since the parties thus far have believed that a state court suit was impossible in any event.

This speculation about a future state court action may become irrelevant if Zych's federal suit survives remand, either because the ASA is found not to apply to a non-embedded Seabird, or if the ASA is deemed applicable but unconstitutional. In either of these latter cases, Zych remains free, as he was before enactment of the ASA, to pursue an admiralty suit under either the law of finds or the law of salvage.

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[14]Federal guidelines promulgated under the ASA have encouraged states, among other things, to issue permits to salvors and to transfer title of ships and artifacts to salvors when appropriate. Abandoned Shipwreck Act Guidelines, 55 Fed.Reg. 50116, 50133, 50135 (Dec. 4, 1990).

Even if federal jurisdiction exists over this case, however, Zych would have to overcome the Eleventh Amendment bar to suits against the states in federal court. The parties have briefed the Eleventh Amendment issue at length, for they believed it the only question relevant to resolving the case. We decline to express our view on the proper disposition of this issue until it is necessary.[15] The case central to the state sovereign immunity issue is *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057, in which a plurality of the Court allowed a federal court to issue process against state officials to secure the possession of shipwreck treasure when those officials had no colorable basis on which to retain possession of the artifacts. *Id.* at 697, 102 S.Ct. at 3321. It explicitly reserved the question presented here of "the extent to which a federal district court exercising admiralty in rem jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns [who do not consent to the adjudication]." *Id.*

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[15]The issue may not arise at all if there is simply no subject matter jurisdiction over Zych's claim. And, even if this Court assumed that jurisdiction existed and considered the Eleventh Amendment issue in isolation, it would need to know whether the Seabird is embedded to assess the colorability of the State's claim under the law of finds. Zych and the State of Illinois have both assumed that Zych's *in rem* suit would constitute a suit "against the State" for Eleventh Amendment purposes only if the state has a colorable claim to title of the shipwreck.

The state asserted at oral argument, without citing authority and contrary to what it assumed on brief, that the colorability of its claim is irrelevant to the Eleventh Amendment analysis. It maintained that Zych's *in rem* suit should be barred even if the state has no possible claim to title. The theory apparently is that it is sufficient that Zych asked that his claim be secured as against "all the world," the state of Illinois included. The state may brief this contention and present it to the district court on remand if it wishes.

It is of course preferable that a suit be resolved on the first appeal. However, we will not question the constitutionality of a federal statute on the mere assumption that it might be relevant. If the ASA applies to the Seabird because it is embedded, our discussion regarding the issues to be considered in determining the ASA's constitutionality will be available to the parties and the district judge. To save time on remand, we invite the district judge to reinstate her original conclusions and reasoning, to the extent that she remains convinced of their correctness.[16] The district court judgment is reversed and remanded with instructions to find whether the Seabird is embedded and, if so, whether the ASA is constitutional so as to permit its application to this case.

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[16]If on remand the district court finds the suit against the state barred on Eleventh Amendment grounds, the court should enter judgment with respect to parties other than the state. While Rule 19(b) requires the dismissal of an action when an indispensable party cannot be joined, the state is not an indispensable party to this admiralty *in rem* action. See *Treasure Salvors*, 458 U.S. at 684, 102 S.Ct. at 3314 (judgment against others may stand though suit against state should have been dismissed as immune); *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel, etc.*, 895 F.2d 116, 123 (3rd Cir.1990), *contra Marx v. Government of Guam*, 866 F.2d 294, 300 (9th Cir.1989); *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6, 8 (1st Cir.1983). The state's rights will not be prejudiced so long as the federal court judgment explicitly declares that it is not adjudicating the state's ownership rights. *Florida Dept. of State v. Treasure Salvors, Inc.*, 689 F.2d 1254, 1256 (5th Cir.1982).

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
No. 93-1426
Mar. 21, 1994

Harry Zych, d/b/a American Diving & Salvage Co.,
Plaintiff-Appellant,

v.

Unidentified, Wrecked, and Abandoned Vessel, Believed To Be the "Seabird," etc., Defendant.

and

Illinois Department of Transportation and the Illinois Historic Preservation Society and United States of America, Intervening Defendants-Appellees.
19 F.3d 1136 (7th Cir.1994)

Harry Zych filed this in rem action to obtain title to an abandoned shipwreck, the Seabird, or, alternatively, a salvage award. The case was presented to the district court and that court dismissed Zych's case for want of jurisdiction. We reversed and remanded the case to the district court. The district court dismissed the case a second time. Zych appeals the second dismissal of his case. He now seeks only a salvage award against the State of Illinois.

The Abandoned Shipwrecks Act of 1987, 43 U.S.C. §§ 2101-06 ("ASA"), declares in part that the law of salvage shall not apply to abandoned shipwrecks, like the Seabird, that are embedded in the submerged lands of the states. Zych contends that this aspect of the ASA violates the Constitution.

I.

This case begins with a fateful trip, that started from a Midwestern port aboard a not so tiny ship. At 7:00 p.m. on April 8, 1868 in Manitowoc, Wisconsin, one hundred passengers boarded the Seabird and set sail for what everyone expected would be a short tour down the icy waters of Lake Michigan to Chicago. Everything went well until 6:00 a.m.

the next day, when the ship was off the coast of Waukegan, Illinois, just north of Chicago. The night had been cold, the weather rough, and the ship's crew had kept the large stove in the main cabin going all night to heat the ship. As daylight came, the porter, a mighty sailor man in his own right, cleaned the fire in the stove, stepped to the rail, and threw the still hot ashes over the side. Unfortunately, the porter emptied the container of ashes into the wind and the wind blew the ashes back into the Seabird. The ashes started a fire and the ship was sunk. Even the courage of the fearless crew, led by the brave and sure Captain John Morris, could not save the Seabird. All but two persons aboard the Seabird perished. The ship set ground on the bottom of Lake Michigan, where it rested at some unknown and undiscovered place for one hundred and twenty-one years, when Harry Zych located her.

Zych, who operates a commercial salvage business, filed this admiralty action in rem to obtain either title to the Seabird or a salvage award. Zych sought relief against all claimants and all the world. The Illinois Department of Transportation ("IDOT") and the Illinois Historic Preservation Agency ("IHPA") intervened on behalf of the State of Illinois. The State asserted title to the Seabird pursuant to the ASA and also claimed that the Eleventh Amendment barred Zych's suit. Zych responded by challenging the constitutionality of the ASA. That challenge brought the United States into the case to defend the statute's constitutionality. The district court dismissed Zych's complaint because it found that his admiralty action constituted an action against the State of Illinois in violation of the Eleventh Amendment. Zych v. Unidentified, Wrecked and Abandoned Vessel, 746 F.Supp. 1334, 1350-52 (N.D.Ill.1990). Zych appealed and we reversed. Zych v. Unidentified, Wrecked and Abandoned Vessel, 941 F.2d 525

(7th Cir.1991) ("Zych I "). We remanded the case to the district court with instructions to find whether the Seabird is embedded in the submerged lands of Illinois and, if so, whether the ASA is constitutional so as to permit its application to this case. On remand to the district court, Zych admitted that the Seabird is embedded for purposes of the ASA. The district court held that the Seabird is embedded, that the ASA applies, and that nothing about the ASA violates the Constitution. Zych v. Unidentified, Wrecked and Abandoned Vessel, 811 F.Supp. 1300 (N.D.Ill.1992). The district court therefore dismissed Zych's case.

II.

In this appeal, Zych repeats his contention that the ASA is unconstitutional. Zych has abandoned that part of his original claim that sought title to the Seabird. Instead, Zych now admits that Illinois is the owner of the Seabird pursuant to the law of finds. See infra note 2. He argues that the law of salvage should be applied to require Illinois to pay him a salvage award for his efforts to salve the Seabird. Zych contends that the ASA violates the Constitution when it declares that the law of salvage shall not apply to abandoned shipwrecks that are embedded in the submerged lands of the states. 43 U.S.C. §§ 2105, 2106(a).

The Constitution provides that "[t]he judicial Power shall extend ... to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. This provision presupposes the existence in the United States of a general body of admiralty and maritime law prior to the Constitution. Panama R.R. v. Johnson, 264 U.S. 375, 385, 44 S.Ct. 391, 393, 68 L.Ed. 748 (1924). The purpose of Article III's admiralty and maritime jurisdictional grant was to place the admiralty and maritime law under national control because of its intimate

relation to navigation and to interstate and foreign commerce. Id. at 386, 44 S.Ct. at 393.

The Constitution does not define the precise limits of admiralty and maritime jurisdiction, nor does it draw any obvious boundary between federal and local law. Detroit Trust Co. v. The Barlum, 293 U.S. 21, 43, 55 S.Ct. 31, 38, 79 L.Ed. 176 (1934); The Lottawanna, 88 U.S. (21 Wall.) 558, 574, 22 L.Ed. 654 (1875). Instead, the Constitution creates a highly intricate interplay between the state and national governments in their regulation of admiralty and maritime commerce and activities. Romero v. International Term Co., 358 U.S. 354, 373, 79 S.Ct. 468, 480, 3 L.Ed.2d 368 (1959); The Steamer St. Lawrence, 66 U.S. (1 Black) 522, 527, 17 L.Ed. 180 (1861). The states have a wide scope in this context, but their laws must, of course, yield to the needs of a uniform federal system. American Dredging Co. v. Miller, --- U.S. ----, ---- - ----, 114 S.Ct. 981, ---- - ----, --- L.Ed.2d ---- (U.S.1994); Romero, 358 U.S. at 373, 79 S.Ct. at 480.

Article III's admiralty and maritime provision contains three implied grants of power. First, it empowers Congress to confer admiralty and maritime jurisdiction on the lower federal courts. Id. at 360, 79 S.Ct. at 473. Second, Article III authorizes the federal courts to draw on the substantive law inherent in the admiralty and maritime jurisdiction. Id. Finally, Article III grants Congress the power to revise and supplement the maritime law within the limits of the Constitution. Id. Zych contends that Congress exceeded its authority under this last grant of power when, in the ASA, it declared that the law of salvage shall not apply to shipwrecks like the Seabird.

Congress can alter, qualify, or supplement admiralty law as

it sees fit in the exercise of its wide discretion. O'Donnell v. Great Lakes Dredge & Dry Dock Co., 318 U.S. 36, 40, 63 S.Ct. 488, 491, 87 L.Ed. 596 (1943); Panama R.R., 264 U.S. at 386, 44 S.Ct. at 393. Congress' power in this regard is paramount and the Supreme Court has sustained numerous legislative enactments by the Congress. See, e.g., Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986) (upholding application of the Death on the High Seas Act, 46 U.S.C. §§ 761 et seq.); O'Donnell, 318 U.S. at 39-41, 63 S.Ct. at 490-91 (upholding the Jones Act, 46 U.S.C. § 688); Detroit Trust Co., 293 U.S. at 44-45, 55 S.Ct. at 38-39 (listing several legitimate exercises of congressional power to alter, qualify, or supplement admiralty and maritime law from 1789-1927).

The Supreme Court has established two constitutional limits on Congress' ability to legislate in the admiralty and maritime context. First, Congress can neither exclude a thing that falls clearly within the admiralty and maritime law nor can it include a thing that clearly falls without. Panama R.R., 264 U.S. at 386, 44 S.Ct. at 393. Second, congressional statutes must be coextensive with and operate uniformly in the whole of the United States. Id.

In Zych I, we held that the ASA did not conflict with the second limitation, the uniformity principle. We left unanswered whether the ASA, as applied here, conflicts with the first limitation--that is, whether the ASA excludes a thing that falls clearly within the admiralty and maritime law. Zych argues that the thing unconstitutionally excluded here by the ASA is the law of salvage.

Congress passed the ASA to clear up any confusion over who owns certain abandoned shipwrecks. Zych I, 941 F.2d at 528. As relevant to this case, the ASA applies to abandoned

shipwrecks that are embedded in the submerged lands of the states. 43 U.S.C. §§ 2101, 2102 & 2105(a)(1). A shipwreck, for purposes of the ASA, includes "a vessel or wreck, its cargo, and other contents." 43 U.S.C. § 2102(d). Abandoned shipwrecks are those shipwrecks "which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). An abandoned shipwreck is embedded if it is "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." 43 U.S.C. § 2102(a). "Submerged lands," such as the land beneath Lake Michigan where the Seabird currently sits, are "lands beneath navigable waters." 43 U.S.C. § 2102(f)(1).[1]

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[1]The Submerged Lands Act of 1953, which section 2102(f)(1) incorporates, defines "lands beneath navigable waters" as including:

> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction; [and]
>
> (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles.

43 U.S.C. § 1301(a). The land beneath Lake Michigan

The ASA declares that the "United States asserts title to any abandoned shipwreck that is ... embedded in submerged lands of a State." 43 U.S.C. § 2105(a)(1). The ASA simultaneously transfers title to the abandoned shipwreck "to the State in or on whose submerged lands the shipwreck is located." 43 U.S.C. § 2105(c). The ASA also announces that "[t]he law of salvage ... shall not apply to abandoned shipwrecks to which section 2105 of this title applies." 43 U.S.C. § 2106(a).

Zych contends that the law of salvage falls clearly within the admiralty and maritime law and that the ASA therefore violates the Constitution.

Zych concedes that the law of finds provides the State of Illinois with title to the Seabird.[2] He argues that the law of salvage and The Davis, 77 U.S. (10 Wall.) 15, 19 L.Ed. 875 (1869), require Illinois to pay him a salvage award for his efforts to salve the Seabird. It is a clever argument.

Salvage is a reward given to persons who save or rescue a ship or a ship's goods from shipwreck, fire, or capture. Cope

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where the Seabird is located easily falls within this definition.

[2]The law of finds, in simple terms, is the old rule of finders-keepers, losers-weepers. Columbus-America Discovery Group v. Atlantic Mut. Ins., 974 F.2d 450, 459 (4th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1625, 123 L.Ed.2d 183 (1993). Typically, the finder of the abandoned property acquires title to it. But, the law of finds contains an exception to this general rule. When the abandoned property is embedded in the land, it belongs to the owner of the land. Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1514 (11th Cir.1985). Illinois owns its submerged lands, see 43 U.S.C. § 1311, and the embeddedness exception to the law of finds suggests that Illinois also owns those things, liked the Seabird, that are embedded in its submerged lands.

v. Vallette Dry Dock Co., 119 U.S. 625, 628, 7 S.Ct. 336, 337, 30 L.Ed. 501 (1887); The "Sabine", 101 U.S. (11 Otto) 384, 25 L.Ed. 982 (1880). Three elements are necessary to a valid salvage claim: (1) marine peril; (2) voluntary service rendered outside the context of an existing duty or contract; and (3) success by the salvor such that the salvors' efforts at least contributed to saving the salvaged property. Id. at (11 Otto) 384; Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1515 (11th Cir.1985). If a salvor satisfies these elements, a court may order the owner of the vessel to pay the salvor some amount of money, which would be the salvage award.

The language of section 2106(a) says that the law of salvage shall no longer apply to abandoned shipwrecks. In fact, in a remarkable twist, this provision of the ASA has no effect on the law of salvage because the law of salvage does not apply to abandoned shipwrecks. Columbus-America Discovery v. Atlantic Mut. Ins., 974 F.2d 450, 459 (4th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1625, 123 L.Ed.2d 183 (1993); Chance v. Certain Artifacts Found and Salvaged, 606 F.Supp. 801, 804 (S.D.Ga.1984), aff'd by unpublished decision, 775 F.2d 302 (11th Cir.1985). The law of salvage assumes that the salvaged property is owned by someone other than the salvor. Hener v. United States, 525 F.Supp. 350, 356 (S.D.N.Y.1981). There must be some owner--here, apparently Illinois--that the salvor can obtain a salvage award from. Otherwise, the property is abandoned and the law of finds applies. The ASA, by its terms, only applies to abandoned property--specifically, certain abandoned shipwrecks.

Zych, the ASA, and the law of finds all agree that Illinois owns the Seabird. Zych's suit is really a suit against Illinois

because Zych seeks a salvage award from Illinois. As such, his suit implicates the Eleventh Amendment, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court has held that the Eleventh Amendment prohibits suits, including suits in admiralty, by a citizen of a state against any state, including the citizen's own state, without the state's consent or unless Congress abrogates a state's sovereign immunity. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 247, 105 S.Ct. 3142, 3149, 87 L.Ed.2d 171 (1985); Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 683 & n. 17, 102 S.Ct. 3304, 3313 n. 17, 73 L.Ed.2d 1057 (1982); Ex Parte State of New York, No. 1, 256 U.S. 490, 497, 41 S.Ct. 588, 589, 65 L.Ed. 1057 (1921); Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

In this case, Illinois has not consented to Zych's suit and Congress has not expressed any intent to abrogate Illinois' Eleventh Amendment sovereign immunity. The suit is therefore barred. See Zych v. Wrecked Vessel Believed to be the "Lady Elgin", 960 F.2d 665, 670 (7th Cir.) (Eleventh Amendment prevents a federal district court from declaring that a finder of a shipwreck has rights superior to those of a state that claimed an interest in a wreck), cert. denied, --- U.S. ----, 113 S.Ct. 491, 121 L.Ed.2d 430 (1992); Sindia Expedition v. Wrecked & Abandoned Vessel, 895 F.2d 116, 119 (3d Cir.1990) (same); Fitzgerald v. Unidentified Wrecked and Abandoned Vessel, 866 F.2d 16, 17-19 (1st Cir.1989) (same).

Undeterred by the Eleventh Amendment, Zych points to the

Supreme Court's decision in The Davis, 77 U.S. (10 Wall.) 15, 19 L.Ed. 875 (1870). In that case, a treasury agent of the United States shipped cotton on a schooner, the Davis, from Savannah, Georgia to New York. The ship and her cargo were nearly lost on the voyage to New York, but were saved by one Douglas and other salvors. Douglas sued the United States for a salvage award. The Supreme Court held that "justice and sound policy" require that the federal government pay out salvage awards to salvors when its property has been saved from destruction. Id. (10 Wall) at 19.

The Davis is not Zych's case. If the property consisting of the Seabird and its accompanying cargo are owned by the State of Illinois, the Eleventh Amendment prohibits us from adjudicating Zych's salvage claim, as we have explained. The Davis involved salvaged federal property in a claim against the federal government. Unlike Zych's case, The Davis did not involve salvaged state property where a salvor sought a salvage award from a state. That is the kind of property--i.e., state-owned property--described here by Zych and the ASA.

Zych argues that, by analogy, the exception to governmental sovereign immunity created by The Davis--in the context of federal sovereign immunity--applies to Eleventh Amendment state sovereign immunity. This argument is unpersuasive. To begin with, it ignores the express language of the Eleventh Amendment, which, by its words, indicates that the Eleventh Amendment applies only to suits "against one of the United States." U.S. Const. amend. XI. Zych attempts to overcome this obstacle by pointing to Hans. There, the Court held that the Eleventh Amendment encompasses state sovereign immunity when a citizen of a state sues the citizen's own state. The Court in Hans was not constrained by the Eleventh Amendment's prohibition only of suits "against one of the

United States by Citizens of another State, or by Citizens of any Foreign State." U.S. Const. amend. XI. But, though the words of the Eleventh Amendment may not suggest the result reached by the Court in Hans, that fact does not mean that the language of the Eleventh Amendment is irrelevant. To the contrary, the Eleventh Amendment is clear; it says nothing about federal sovereign immunity.

Moreover, state sovereign immunity is categorically different from federal sovereign immunity. Federal sovereign immunity is a common law doctrine that simply holds that the federal government cannot be sued without its consent. FDIC v. Meyer, --- U.S. ----, ---- - ----, --- L.Ed.2d ---- (U.S.1994); United States v. Dalm, 494 U.S. 596, 608, 110 S.Ct. 1361, 1368, 108 L.Ed.2d 548 (1990). State sovereign immunity is a constitutional doctrine which rests on principles of federalism. As in The Davis, it is one thing for a federal court to order the federal government--of which the federal court is a part--to do something. It is quite another matter for a federal court to order a state--a separate sovereign--to pay something, like a salvage award, without the state's consent. As Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974), points out, the Eleventh Amendment prohibits just this kind of invasion by the federal courts into the treasuries of the states. The Eleventh Amendment bars suits in federal court by private parties that seek to impose a liability which must be paid from the public funds of a state treasury. Id. Zych's suit asks us to do just that--to order the State of Illinois to dip into its treasury and pay him a salvage award. That we cannot do.

The exception to the common law doctrine of federal sovereign immunity alluded to in The Davis does not apply to the state sovereign immunity established by the Eleventh

Amendment.

III.

The Eleventh Amendment does not allow us to order Illinois to pay a salvage award to Zych. The ASA then, as it affects this case, does not exclude a thing that clearly falls within the admiralty and maritime law. The Constitution is not violated, Zych's case is sunk, and the decision of the district court is AFFIRMED.

ABANDONED SHIPWRECK ACT
43 USC §§ 2101-2106 (1994)

§ 2101. Findings

The Congress finds that--

(a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and

(b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

§ 2102. Definitions

For purposes of this Act [43 USC §§ 2101 et seq.]--

(a) the term "embedded" means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 101 of the National Historic Preservation Act (16 U.S.C. 470a);

(c) the terms "public lands", "Indian lands", and "Indian tribe" have the same meaning given the terms in the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470aa-470ll);

(d) the term "shipwreck" means a vessel or wreck, its

cargo, and other contents;

(e) the term "State" means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term "submerged lands" means the lands--

(1) that are "lands beneath navigable waters," as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301);

(2) of Puerto Rico, as described in section 8 of the Act of March 2, 1917, as amended (48 U.S.C. 749);

(3) of Guam, the Virgin Islands and American Samoa, as described in section 1 of Public Law 93-435 (48 U.S.C. 1705); and

(4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94-241 (48 U.S.C. 1681).

§ 2103. Rights of access

(a) Access rights. In order to--

(1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and

(2) provide that reasonable access by the public to such abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant to section 6 of this Act [43 USC § 2105], it is the declared policy of the Congress that States carry out their responsibilities under this Act [43 USC

§§ 2101 et seq.] to develop appropriate and consistent policies so as to--

(A) protect natural resources and habitat areas;

(B) guarantee recreational exploration of shipwreck sites; and

(C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

(b) Parks and protected areas. In managing the resources subject to the provisions of this Act, States are encouraged to create underwater parks or areas to provide additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act [16 USC §§ 470a et seq.], for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

§ 2104. Preparation of guidelines

(a) In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within nine months after the date of enactment of this Act [enacted April 28, 1988] prepare and publish guidelines in the Federal Register which shall seek to:

(1) maximize the enhancement of cultural resources;

(2) foster a partnership among sport divers, fishermen,

archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;

(3) facilitate access and utilization by recreational interests;

(4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

(b) Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).

(c) Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this Act [43 USC §§ 2101 et seq.].

§ 2105. Rights of ownership

(a) United States title. The United States asserts title to any abandoned shipwreck that is--

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) Public notice of location. The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the

Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) Transfer of title to States. The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) Exception. Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) Reservation of rights. This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under--

(1) section 3, 5, or 6 of the Submerged Lands Act (43 U.S.C. 1311, 1313, and 1314); or

(2) section 19 or 20 of the Act of March 3, 1899 (33 U.S.C. 414 and 415).

§ 2106. Relationship to other laws

(a) Law of salvage and the law of finds. The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 6 of this Act [43 USC § 2105] applies.

(b) Laws of the United States. This Act shall not change the laws of the United States relating to shipwrecks, other

than those to which this Act applies.

(c) Effective date. This Act shall not affect any legal proceeding brought prior to the date of enactment of this Act [enacted April 28, 1988].

STATE HISTORIC PRESERVATION LAWS

CATEGORY 1. STATES WITH HISTORIC PRESERVATION LAWS NOT SPECIFICALLY MENTIONING SHIPWRECKS

Alaska:	ALASKA STAT. Sec. 41.35 et seq. (1988)
Arkansas:	ARK. STAT. ANN. Sec. 13-6-301, et seq. and Sec. 13-7-101, et seq. (1987)
Colorado:	COLO. REV. STAT. Sec. 24-80-401 thru Sec. 24-80-401 (1988)
Connecticut:	CONN. GEN. STAT. ANN. Sec 10-381 et seq. (West 1991 Supp.)
Delaware:	DEL. CODE. ANN. tit. 7, Sec. 5301 et seq. and tit. 29, 551 et seq. (1989)
Hawaii:	HAWAII REV, STAT. Sec. 6E-1 thru Sec. 6E-15 (1985)
Idaho:	IDAHO CODE Sec. 67-4113 thru Sec. 67-4122 (1989)
Kansas:	KAN. STAT. ANN. Sec 75-2715 thru Sec. 75-2726 (1989)
Kentucky:	KY. REV. STAT. ANN. Sec. 166.705 thru

Sec. 164.735 (Michie 1987)

Maine: ME. REV. STAT. ANN. tit. 27, Sec. 371-Sec. 378 (1988)

Minnesota: MINN. STAT. Sec. 138.31 - Sec. 138.42 and 138.51 et seq.; ch. 116 (1990)

Montana: MONT.CODE ANN. Sec. 22-3-421 thru Sec. 22-3-442 (1990)

Nevada: NEV. REV. STAT. Sec. 381.195 thru Sec. 381.227 (1986)

New Hampshire: N.H. REV. STAT. ANN, ch. 227-C (1989)

New Jersey: N.J. ADMIN. CODE 7:7E-3.18 (1991)

New Mexico: N.M. STAT. ANN. Sec. 18-6-1 thru Sec. 18-6-17 (1991)

New York: N.Y. PARKS AND RECREATION LAW 14.01 et seq. (McKinney 1984)

North Dakota: N.D. CENT. CODE ch.'s 55-02, 55-02.1, 55-03; 55-10, 55-02-07, 55-03-01, 55-10-02, 55-10-08 and 55-10-10 (1978)

Ohio: OHIO REV CODE ANN, Sec. 149.51 et seq. (Page 1990)

Oklahoma: OKLA. STAT. tit. 53, Sec. 1.1 et seq. and Sec. 361 (1991)

Oregon: OR. REV. STAT. Sec. 358.905 thru Sec. 358.955 and 390.235 (1987)

Pennsylvania: PA. STAT. ANN. tit 37, Sec. 101 - Sec. 104 and Sec. 701 - Sec. 705 (Brig NIAGARA) (Purdon 1991 Supp.)

South Dakota: S.D. CODIFIED LAWS ANN. ch.'s 1-19A, 1-19B and 1-20 (1985)

Tennessee: TENN. CODE ANN. Sec. 11-6-101 thru Sec. 11-6-119 (1991 Supp.)

Utah: UTAH CODE ANN. Sec. 63-18-18 thru Sec. 63-31 (1989)

Vermont: VT. STAT. ANN, tit. 22, Sec 701 et seq. (1987)

West Virginia: W. VA CODE 29-1-8b (1991 Supp.)

Wisconsin: WIS. STAT. ANN. Sec. 44.47 (West 1990)

Wyoming: WYO. STAT. Sec. 36-1-114 thru Sec. 36-1-116 (1977)

TERRITORIES:

Guam: GUAM GOV'T CODE Sec. 13985 et seq. (1990)

Puerto Rico: P.R. LAWS ANN. TIT. 23, 161-186 (1987)

North Mariana Islands: P.L. No. 2-7, tit. 2, CMC Section 1100 et seq. (1990)

CATEGORY TWO. STATES HAVING HISTORIC PRESERVATION LAWS SPECIFICALLY INCLUDING SHIPWRECKS

Arizona: ARIZ. REV. STAT. Sec. 41-841 thru Sec. 41-847 (1988) (Sec. 41-841)

Indiana: IND. CODE Sec. 14-3-3.3-1 thru Sec. 14-3.3-18 and Sec. 14-3-3.4-1 through 14-3-3.4-20 (1990)

Maryland: MD. HOUS. & DEV. CODE, ANN. ART, 83B, Sec. 5-601 et seq. (1991 Supp.)

Rhode Island: R.I. GEN. LAWS Sec. 42-45.1-Sec. 42-45.1-13 (Sec. 42-45.1-4) (1988)

Washington: WASH. REV. CODE ch. 27.53 (1982) and

Sec. 27.53.045 (1991 Supp.)

CATEGORY THREE. STATES HAVING HISTORIC PRESERVATION LAWS SPECIFICALLY INCLUDING SHIPWRECKS AND PRESCRIBING RULES FOR SALVAGE

Alabama: ALA. CODE Sec. 41-3-1 through Sec. 41-3-6 (1982) and Sec. 41-9-249.1 (1982)

California: CAL. PUB. RES. CODE Sec. 5097 et seq. Sec. 6309, Sec. 6313 and Sec. 6341 (West 1991 Supp.)

Florida: FLA. STAT. Sec. 267.061 thru Sec. 267.152 (1989) (267.061(b))

Georgia: GA. CODE ANN. Sec. 12-3-52 thru Sec. 12-3-54 and Sec. 12-3-80 thru Sec. 12-3-83 (1988)

Louisiana: LA. STAT. ANN., R.S. 41:1601 through Sec. 41:1614 (1990) (Sec. 41:1605)

Massachusetts: MASS. GEN. LAWS ANN. ch. 6, 179-180; ch. 9, 26A-C; ch. 9, 27-27C; and ch. 91, 63 (1986)

Michigan: MICH. COMP. LAWS Sec. 299.51 - Sec. 54 ch. 399 (Sec. 399.301-399.410)(1991 Supp.)

Mississippi: MISS. CODE ANN. 39-7-1 et seq., Sec. 39-7-3 and Sec. 39-7-9 (1990)

North Carolina: N.C. GEN. STAT. Sec. 70-10 thru Sec. 70-20; and Sec. 121-22 et seq. (1991)

South Carolina: S.C. CODE ANN. Sec. 54-7-400 thru Sec. 54-7-500 (1990 Supp.)

Texas: TEX. NAT. RES. CODE ANN. ch., 191 (Vernon 978)

Virginia: VA. CODE Sec. 10.1-2200 thru 10.1-2404 (10.1-2214) (1989)